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Petition not printed

Office - Supreme Court, U. S.
FILED
JUN 23 1941
CHARLES ELMORE CROPLEY
CLERK

314 US. 610

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941

No. 99

EVA BROOKS,
Petitioner and Appellant,

vs.

HILL-SHAW COMPANY, a corporation,
Respondent and Appellee.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE.

The Issues.

The petitioner has not, in her petition, contended that she produced on the trial any direct proof of negligence on the part of the respondent. On page 5 of the petition it is stated: "Her case was bottomed on the theory of *res ipsa loquitur*." See also statement at the middle of page 23 of the petition.

The issues before this Court are, therefore, narrowed down to the single question of law of whether or not the Circuit Court of Appeals was correct in holding that the doctrine of *res ipsa loquitur* is not applicable to the facts presented.

The Facts.

The Circuit Court of Appeals has, in its opinion, stated the facts in evidence as favorably to the petitioner as could be justified by the record. The petitioner has not challenged this statement of facts. Briefly summarized, they are as follows: The coffee maker in question is of the type commonly used in homes and restaurants, and found on display in quantities where kitchen utensils are sold (Petitioner's Exhibit 1-H and 1-B). The plaintiff did not purchase the coffee maker in question from the respondent, but from one Sohm, doing business as The Century Tea and Coffee Company (Tr. 260, 261, 335). At the time of the occurrence complained of, and for a long period of time prior thereto, the coffee maker was in the sole and exclusive management and control of the petitioner (Tr. 119, 154, 268, 333, 348). At the time of the occurrence in question and for the same period prior thereto, at least, the respondent had no control of the coffee maker whatsoever. It remained in the custody and control of the petitioner up to the time of the trial.

The coffee maker in question did not "explode" as stated by petitioner (Petition 4, 13). The petitioner's evidence merely tends to show that the upper bowl of the coffee maker was blown loose from the lower bowl, presumably by steam pressure therein, and thrown up onto the plaintiff's shoulder (Tr. 352). After the occurrence in question, the lower bowl was intact, as was also the upper bowl, except that the glass stem attached thereto was broken off at a point *below* the rubber gasket by which the two bowls were joined (Tr. 368-371, Plaintiff's Exhibit "D," Tr. 138). The petitioner testified that when she saw the equipment the next day after the accident, the part of the stem that was broken

off was in the lower bowl (Tr. 369). There is no evidence in the record whatever that the coffee maker in question, or any part of it, was defective, either in construction or design. The petitioner testified that it was in good condition at the time she started to make use of it on the occasion in question (Tr. 369, 370, 378) and that she had been using the coffee maker successfully five or six times a day for period of months (Tr. 392).

There is no evidence in the record that the "last replacement" was involved in the occurrence in question as the petitioner would have this Court infer (Petition 12). The petitioner testified that she did not know whether it was or not (Tr. 390). The condition of the rubber gasket attached to the broken stem clearly shows that it had been in use for a considerable period of time. So far as the petitioner's evidence is concerned, it is more likely that the part broken was one of the first she received than that it was the last.

The Reasons Relied on by Petitioner for Allowance of the Writ.

1. The petitioner's contention (Petition 6) that the decision of the Circuit Court of Appeals is in direct conflict with the holding in *Stolle* v. *Anheuser-Busch,* 307 Mo. 520, 271 S. W. 497, and *Riecke* v. *Anheuser-Busch Brew. Assn.,* 206 Mo. App. 246, 227 S. W. 631, is untenable. As pointed out by the Circuit Court of Appeals, the situations involved in those cases are not in any way analogous to that in the case at bar.

2. The petitioner's contention that the Circuit Court of Appeals usurped the functions of the jury in holding the doctrine of *res ipsa loquitur* inapplicable to the facts presented is without foundation. The Circuit Court of Appeals did not weigh the evidence. By attempting to

invoke the doctrine of *res ipsa loquitur,* the petitioner admits that her proof, without the presumption raised by the doctrine, is insufficient to sustain a verdict in her favor. Whether or not the doctrine is applicable to the plaintiff's proof is a question of law for the Court and not a question of fact for the jury. In holding that the doctrine was not applicable to the facts presented, the Circuit Court of Appeals was, therefore, deciding a question of law and not weighing the evidence for the determination of a question of fact. The holding of the Circuit Court of Appeals is, therefore, not contrary, as petitioner contends, to the ruling of this Court in *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, or *McCaughn* v. *Real E. L. T. & T. Co.,* 297 U. S. 606. In neither of those cases was the applicability of the doctrine of *res ipsa loquitur* involved.

The same is true with reference to the cases of *Oliver* v. *Bell,* 103 Fed. (2) 760, *U. S.* v. *Scott,* 50 Fed. (2) 773, *Detroit T. & T. Co.* v. *Pratt,* 2 Fed. (2) 193, *R. E. Hamilton & Sons Co.* v. *Moss-Jellico Coal Co.,* 271 Fed. 237, and *In re Country Club Bldg. Corp.,* 91 Fed. (2) 713. In each of these cases the Circuit Court of Appeals was asked to find the facts different than did the trial court. In none of them was the court called upon to find, as a matter of law, that there was no evidence to sustain the findings of the trial court. In none of them was the applicability of the doctrine of *res ipsa loquitur* involved.

3. Contrary to the petitioner's contention, the judgment of the trial court was not in contravention of Rule 50, Rules of Civil Procedure for District Courts. On the contrary, the procedure prescribed by Rule 50 was followed by the trial court. The trial court did not weigh the evidence to determine the questions of fact. On the contrary, it examined the evidence for the purpose

of determining whether or not it was sufficient to sustain the verdict. The trial court found, as a matter of law, that there was no evidence to sustain the verdict. The right to a trial by jury secured by the Seventh Amendment to the Constitution is not violated by the entry of a judgment notwithstanding the verdict when, as a matter of law, a plaintiff has failed to prove the charges laid in her complaint.

4. The question of whether or not a manufacturer can be held liable for an injury caused by an imminently dangerous instrumentality, in the absence of express proof of negligence in manufacture, is not an issue in the case at bar.

5. Nor is the question of whether or not the doctrine of *res ipsa loquitur* can be invoked against a manufacturer after the goods have left his hands, no matter how negligent he may have been in manufacturing them, an issue in the case at bar.

SUMMARY OF ARGUMENT.

A.

The doctrine of res ipsa loquitur is not applicable to the facts presented in the case at bar.

The evidence shows, without contradiction, that, at the time of the occurrence complained of, the coffee maker in question was under the exclusive management and control of the petitioner and that the respondent had no control of it whatever. It has been uniformly held that the doctrine cannot be invoked where the instrumentality alleged to have caused the injury was not, at the time of injury, under the control of the party charged.

Wigmore on Evidence, 3rd Ed., Vol. 9, page 380, sec. 2509.

1. Such is the law as laid down by the courts of Missouri.

Tayer v. *York Ice Machine Co.*, 342 Mo. 912 at 923; 119 S. W. (2d) 240 at 244; 117 A. L. R. 1414 at 1419, 1421.

Beebe v. *St. Louis Transit Co.*, 206 Mo. 419 at 440, 441; 103 S. W. 1019 at 1025.

McClosky v. *Koplar*, 329 Mo. 527 at 534; 46 S. W. (2d) 557 at 559.

Hart v. *Emery, Bird, Thayer Dry Goods Co.*, 233 Mo. App. 312 at 316; 118 S. W. (2d) 509 at 510, 511.

Hartnett v. *May Department Stores Co.*, 231 Mo. App. 1116 at 1125; 85 S. W. (2d) 644 at 648.

Gallagher v. *St. Louis Pub. Serv. Co.*, 332 Mo. 944 at 953 and 954; 59 S. W. (2d) 619 at 621, 622.

Russell v. *St. Louis S. F. Ry. Co.* (Mo. App.), 245 S. W. 590 at 591.

2. Also as laid down by the courts of Illinois.

Bollenbach v. *Bloomenthal,* 341 Ill. 539 at 544; 173 N. E. 670 at 671.

Todd v. *S. S. Kresge Co.,* 303 Ill. App. 89 at 99; 24 N. E. (2d) 899 at 903-904.

Herbst v. *Levy,* 279 Ill. App. 353 at 362.

3. And as laid down by this and other Federal Courts.

Louisville & Nashville Railroad Co. v. *Chatters,* 279 U. S. 320 at 332; 73 L. Ed. 711 at 719; 49 S. Ct. 329.

San Juan Light Co. v. *Requena,* 224 U. S. 89 at 98-99; 56 L. Ed. 680 at 684; 32 S. Ct. 399.

Bonner v. *Texas Co.,* 89 Fed. (2d) 291 at 294.

4. Furthermore, the doctrine of res ipsa loquitur cannot be invoked by mere proof that an injury was sustained. There must be proof of facts or circumstances which point out the wrongdoer, the tortious character of his act and exclude other probable causes of the injury.

Herbst v. *Levy,* 279 Ill. App. 353 at 362.

Smith v. *United States,* 96 Fed. (2d) 976 at 977.

Gallagher v. *St. Louis Pub. Serv. Co.,* 332 Mo. 944 at 953 and 954; 59 S. W. (2d) 619 at 621-622.

Beebe v. *St. Louis Transit Co.,* 206 Mo. 419 at 441; 103 S. W. 1019 at 1025, 1026.

Klebe v. *Parker Distilling Co.,* 207 Mo. 480 at 491; 105 S. W. 1057 at 1060.

Removich v. *Bambrick Bros. Constr. Co.,* 264 Mo. 43 at 57; 173 S. W. 686 at 689.

Ford Motor Co. v. *Wolber,* 32 Fed. (2d) 18 at 21.

5. The doctrine of res ipsa loquitur is a rule of necessity and cannot be invoked when the necessary evidence is available to the plaintiff.

O'Mara v. *Pennsylvania R. Co.*, 95 Fed. (2d) 762 at 763.

Heffter v. *Northern States Power Co.*, 173 Minn. 215 at 219; 217 N. W. 102 at 103.

Pronnecke v. *Westlicke Post. Pub. Co.*, 220 Mo. App. 640 at 647-648; 291 S. W. 139 at 141.

Byers v. *Essex Ins. Co.*, 218 Mo. 375 at 382; 219 S. W. 570 at 571.

Klebe v. *Parker Distilling Co.*, 207 Mo. 480 at 491; 105 S. W. 1057 at 1060.

Roscoe v. *Met. Street Ry. Co.*, 202 Mo. 576 at 587; 101 S. W. 32 at 35.

Gibbons v. *Wells* (Mo. App.), 293 S. W. 89 at 92.

Brown v. *St. Louis Gas Co.* (Mo. App.), 131 S. W. (2d) 354 at 359.

B.

The Circuit Court of Appeals did not weigh the evidence. On the contrary it examined the evidence for the purpose only of determining whether the evidence was sufficient to sustain a verdict for the petitioner. It found as a matter of law that the evidence was insufficient.

Baltimore & Carolina Line v. *Redman*, 295 U. S. 654 at 661; 79 L. Ed. 1636 at 1640; 55 S. Ct. 890.

Gulf, M. & N. R. Co. v. *Wells*, 275 U. S. 455 at 459; 72 L. Ed. 370 at 372; 48 S. Ct. 15.

Mass. Protective Ass'n v. *Mouber*, 110 Fed. (2d) 203 at 207.

Lewis-Kures v. *Edward R. Walsh & Co.*, 102 Fed. (2d) 42 at 45; cert. denied, 308 U. S. 596; 84 L. Ed. 499; 60 S. Ct. 132.

C.

The trial court did not weigh the evidence. It found as a matter of law that the evidence was insufficient to support the verdict.

Chicago M. & St. P. R. Co. v. *Coogan,* 271 U. S. 472 at 478; 70 L. Ed. 1041 at 1045; 46 S. Ct. 464.

Baltimore & Carolina Lines v. *Redman,* 295 U. S. 654 at 661; 79 L. Ed. 1636 at 1640; 55 S. Ct. 890.

Brunet v. *S. S. Kresge Co.,* 115 Fed. (2d) 713 at 716.

D.

Negligence is never presumed from the fact of the accident alone.

Western & A. R. Co. v. *Henderson,* 279 U. S. 639 at 642; 73 L. Ed. 884 at 888.

Rotche v. *Buick Motor Co.,* 358 Ill. 507 at 516; 193 N. E. 529 at 533.

Huff v. *I. C. R. R. Co.,* 362 Ill. 95 at 101; 199 N. E. 116 at 119.

E.

Whether or not a manufacturer can ever be held liable under the principle of res ipsa loquitur is not an issue in the case.

Tayer v. *York Ice Machine Co.,* 342 Mo. 912 at 920; 119 S. W. (2d) 240 at 243; 117 A. L. R. 1414.

F.

Although the finding of the Circuit Court of Appeals that the doctrine of res ipsa loquitur is not applicable to the facts presented is sufficient reason for sustaining the judgment, there are additional reasons why the judgment of the trial court should be sustained.

1. Under the allegations of her complaint, the petitioner was not entitled to invoke the doctrine of res ipsa loquitur.

Gray v. *Baltimore & O. R. Co.*, 24 Fed. (2d) 671 at 673.

Federal Electric Co., Inc. v. *Taylor*, 19 Fed. (2d) 122 at 125.

Bean v. *Independent Torpedo Co.*, 4 Fed. (2d) 504 at 505.

O'Rourke v. *Field & Co.*, 307 Ill. 197 at 199-200; 138 N. E. 625 at 626.

Pointer v. *Mountain Ry. Const. Co.*, 269 Mo. 104 at 114; 189 S. W. 805 at 808.

2. Even though the petitioner had proved sufficient facts to entitle her to invoke the doctrine (which she did not), her own proof, as well as that of the respondent, rebutted any presumption that would have been raised by the doctrine, and under the law of Illinois, the state of the forum, such presumption vanishes entirely.

Bollenbach v. *Blumenthal*, 341 Ill. 539 at 547; 173 N. E. 670 at 671.

Wilson v. *East St. Louis & Int. Water Co.*, 295 Ill. App. 603 at 609; 15 N. E. (2d) 599 at 602.

Kerwin v. *Stonington Elevator Co.*, 291 Ill. App. 471 at 475; 10 N. E. (2d) 224 at 226.

3. The coffee maker in question was not inherently or imminently dangerous.

Miller v. *Sears-Roebuck & Co.*, 250 Ill. App. 340 at 344.

4. There being no privity of contract between petitioner and respondent, under the law of Missouri, the state in which the accident occurred, there can be no recovery on the grounds of negligence.

Heizer v. *Kingsland & Douglas Mfg. Co.*, 110 Mo. 605 at 611; 19 S. W. 630 at 632.

Tipton v. *Barnard & Leas Mfg. Co.*, 302 Mo. 162; 257 S. W. 791.

Tayer v. *York Ice Machine Co.*, 342 Mo. 912 at 920-921; 119 S. W. (2d) 240 at 243; 117 A. L. R. 1414 at 1419.

ARGUMENT.

A.

The doctrine of res ipsa loquitur is not applicable to the facts presented in the case at bar.

The evidence shows, without contradiction, that, at the time of the occurrence complained of, the coffee maker in question was under the exclusive management and control of the petitioner and that the respondent had no control of it whatever. It has been uniformly held that the doctrine cannot be invoked where the instrumentality alleged to have caused the injury was not, at the time of injury, under the control of the party charged.

The petitioner's contention that since the case arose in Missouri it is governed by Missouri law, is only partially correct. The petitioner's substantive rights, if any she has, are, of course, governed by the law of Missouri. The doctrine of *res ipsa loquitur*, being a rule of evidence, is not a rule of substantive law, as petitioner contends, but of procedural law, and the significance to be attached to it, if it were applicable, would be governed by the law of the forum—the law of Illinois. This distinction is immaterial here, however, since the doctrine is not applicable to the plaintiff's proof.

The petitioner's proof shows that at the time of the occurrence the coffee maker in question was, and for a considerable period of time prior thereto had been, in her sole and exclusive control and that the respondent had no control of it whatever. She had used the coffee maker in question and others like it successfully many times. She testified that just prior to the occurrence complained of she had cleaned the coffee maker in ques-

tion, had adjusted the filter in the upper bowl, put water in the lower bowl, affixed the bowls together, placed the required amount of coffee in the upper bowl, placed the coffee maker on the stove and turned on the current. She further testified that as the water became heated it rose into the upper bowl, as was to be expected. According to her testimony, after the upper bowl had become almost filled with water, it was blown loose from the lower bowl onto her shoulder causing her to be badly burned. She offered no proof as to the proximate cause of the occurrence, but attempts to invoke the doctrine of *res ipsa loquitur* to supply this lack of proof. This, we submit, she cannot do. Her sole and exclusive control of the coffee maker in question, the stove, the water and the coffee, and the operations preparatory to making the coffee preclude the application of the doctrine.

Professor Wigmore in his work on Evidence, 3rd Edition, Volume 9, page 380, Section 2509, in discussing the application of the doctrine of *res ipsa loquitur* says:

> "What the final accepted shape of the rule will be can hardly be predicted. But the following considerations ought to limit it: (1) the apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) both inspection and user must have been at the time of the injury in the control of the party charged; (3) the injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured. It may be added that the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause whether culpable or innocent, is practically accessible to him but inaccessible to the injured person."

In support of this statement, Professor Wigmore cites and quotes from a large number of authorities, as well as other text writers on the subject.

1. Such is the law as laid down by the courts of Missouri.

The facts in the case of *Tayer* v. *York Ice Machine Co.*, 342 Mo. 912, 119 S. W. (2d) 240, 117 A. L. R. 1414, are very closely analogous to those in the case at bar. In the *Tayer case* the defendant manufactured ammonia compressors, two of which it sold to the Morrell Company, the employer of plaintiff's deceased. In the case at bar, the defendant manufactured the coffee maker in question, which was sold by the defendant to a dealer and by the dealer supplied to the petitioner, together with others of the same kind. In the *Tayer case* the ammonia compressor had been in use by the Morrell Company for a period of approximately eight months, part of which time it was under the supervision of the plaintiff's deceased. In the case at bar the coffee maker in question had been used by the petitioner for a period of probably from four to six months, all of which time it was under her exclusive control. In the *Tayer case* the plaintiff's deceased was injured by the explosion of ammonia gas which escaped because of the bursting of the manifold in one of the compressors. In the case at bar the petitioner was injured by the so-called "explosion" of the coffee maker in question. In the *Tayer case* there was evidence to the effect that the manifold which burst was defective. In the case at bar there was no evidence that the coffee maker in question was defective in any respect whatever. In the *Tayer case* the instrumentality involved was a large, complicated piece of machinery requiring special knowledge for its operation. In the case at bar the instrumentality was a simple device for making coffee such as is in common use. In the *Tayer case,* as in the case

at bar, the plaintiff attempted to invoke the doctrine of *res ipsa loquitur*. The Supreme Court of Missouri, however, after an extended examination of the authorities, particularly the case of *Stolle* v. *Anheuser-Busch,* 307 Mo. 520, strongly relied upon by the petitioner here, and after quoting with approval the above statement from Wigmore on Evidence, held that the doctrine was not applicable, saying at page 923:

> "Observations made in connection with the last previous issue are applicable here. Principally, they relate to the exclusive possession and control of the manifold by the Morrell Company, without any right of possession or control in appellant; the subjecting of the manifold by the Morrell Company to the flow and pressure of ammonia, rapid changes in temperature, and 'knocking' or 'pounding' from liquid ammonia. With reference to such matters, as well as other possible contingencies that may have had a bearing upon the proper maintenance, and the functioning of the manifold during said eight months' interval, appellant did not have legally superior accessibility. Consult *Klebe* v. *Parker Distilling Co.,* 207 Mo. 480, 491, 105 S. W. 1057, 1060, 13 L. R. A. (N. S.) 140, 144. Fundamental factors differentiate the instant case from cases involving merchandise inflicting injury upon first or prior to being put to its intended use, especially food and drink intended for human consumption, marketed in sealed containers (a factor in the McLeod Case) precluding interference and intervention by third parties. The testimony in the instant case does not bring it under the authorities wherein a plaintiff's case has been held to be aided by the *res ipsa loquitur* rule."

In *Beebe* v. *St. Louis Transit Co.,* 206 Mo. 419, 103 S. W. 1019, the plaintiff, a motorman, was injured by an explosion in the control box of one of the defendant's street cars which the plaintiff was operating. The court in the course of its opinion discusses the rela-

tive control of the instrumentality by the plaintiff and defendant and say at page 1025:

> "The general rule is that the burden rests upon the plaintiff to prove the negligence of defendant as alleged in the petition, and that such negligence was the proximate cause of the injury—'in other words, negligence is not presumed, but must be proved. The difficulty of proving the negligence charged does not affect the principal.' 6 Thom. on Law of Neg. Sec. 76, 9 S—. We are firmly of the opinion that the doctrine of *res ipsa loquitur* is not applicable to the facts in this case."

In *McClosky* v. *Koplar,* 329 Mo. 527, 46 S. W. (2d) 557, relied upon by the petitioner here, the court adopts the following statement concerning the doctrine at page 534:

> "(2) In general and on principle the doctrine of *res ipsa loquitur* does not apply except when (a) the occasion resulting in injury was such as does not ordinarily happen if those in charge use due care; (b) the instrumentalities involved were under the management and control of the defendant; (c) and the defendant possesses superior knowledge or means of information as to the cause of the occurrence."

In *Hartnett* v. *May Department Stores Co.,* 231 Mo. App. 1116, 85 S. W. (2d) 644, the court says at page 1125:

> "The *res ipsa loquitur* rule is not grounded solely on an unusual occurrence resulting in injury. It is true that the unusual occurrence is a circumstance which speaks negligence because such things do not ordinarily happen without negligence. But a presumption of negligence is drawn not alone for that reason, but also for the further reason that the person called on to answer for the injury was in the exclusive control of the instrumentalities involved, and the evidence respecting the cause of the unusual occurrence is peculiarly and usually exclusively within his knowledge and power."

See also for similar statements of the rule: *Hart* v. *Emery, Bird, Thayer Dry Goods Co.,* 233 Mo. App. 312, at 316; 118 S. W. (2d) 509 at 510-511; *Gallagher* v. *St. Louis Pub. Serv. Co.,* 332 Mo. 944 at 953-954; 59 S. W. (2d) 619 at 621-622; *Russell* v. *St. Louis S. F. Ry. Co.,* (Mo. App.) 245 S. W. 590 at 591.

In the *Russell case* the court says at page 591:

> "The doctrine of *res ipsa loquitur* is a rule of evidence and applies only when the facts are such that the court can and will take judicial notice that unless negligence had been present in some form the injury would not have occurred, and the facts causing the injury are peculiarly within the knowledge of the defendant and not equally accessible to the plaintiff."

2. Also as laid down by the courts of Illinois.

The courts of Illinois have placed the same limitations on the applicability of the doctrine. *Bollenbach* v. *Bloomenthal,* 341 Ill. 539 at 544; 173 N. E. 670 at 671; *Todd* v. *S. S. Kresge Co.,* 303 Ill. App. 89 at 99; 24 N. E. (2d) 899 at 903-904; *Herbst* v. *Levy,* 279 Ill. App. 353 at 362.

In defining the doctrine the Supreme Court of Illinois say in the *Bollenbach case* at page 542:

> "The doctrine of *res ipsa loquitur* is, that whenever a thing which produced an injury is shown to have been under the control and management of the defendant and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of the injury itself will be deemed to afford *prima facie* evidence to support a recovery in the absence of an explanation by the defendant tending to show that the injury was not due to his want of care. The presumption or inference of negligence raised by the application of this doctrine is not absolute or conclusive, but is rebuttable, and vanishes entirely when any evidence appears to the contrary."

In the *Todd case* where the plaintiff alleged she was injured by a swinging door at the entrance to the defendant's store, the court says at page 99:

> "It is appellee's contention that appellant is liable under the doctrine of *res ipsa loquitur*. To render this doctrine applicable, it must be shown that the instrumentality causing the injury was under the control of the defendant, and that the injury was caused by some act incident to such control, and be of such nature that it would have not occurred but for the defendant's negligence. Here, the accident might have resulted from one of several causes, for some of which the defendant would not be liable. * * * Operation of such doors is not within the exclusive control of the proprietor of the store."

3. And as laid down by this and other Federal Courts.

In the case of *Louisville & Nashville Railroad Co.* v. *Chatters,* 279 U. S. 320, 73 Law Ed. 711, 49 S. Ct. 329, the plaintiff purchased a through ticket from the Louisville & Nashville Railroad Co. from New Orleans to Washington, D. C. and took passage on a car belonging to the said defendant. The train of which this car was a part passed over several connecting railroads in the course of the trip. After it had passed from the Louisville & Nashville Railroad Company's line onto a connecting line, a window screen attached to the outside of the car became loose, swung back and struck the window near which the plaintiff was seated, breaking the window and the plaintiff was injured by pieces of flying glass. This court say at page 332:

> "The occurrence of the accident after the car passed beyond the control of the Louisville & Nashville and that of the intermediate carrier to the tracks of the Southern does not admit of the application of the doctrine of *res ipsa loquitur* so far as concerns the Louisville & Nashville. *McNamara* v. *Boston & M. R. Co.,* 202 Mass. 491, 499, 89 N. E.

131; *Louisville & N. R. Co.* v. *Mink,* 168 Ky. 394, 182 S. W. 188; cf. *Glynn* v. *Central R. Co.,* 175 Mass. 510, 78 Am. St. Rep. 507, 56 N. E. 698, 7 Am. Neg. Rep. 442; *Missouri, K. & T. R. Co.* v. *Merrill,* 65 Kan. 436, 59 L. R. A. 711, 93 Am. St. Rep. 287, 70 Pac. 358, 12 Am. Neg. Rep. 275. Without resort to this doctrine, the cause of the accident and the relation of the Louisville & Nashville to it are matters of mere speculation and conjecture which should have been withdrawn from the consideration of the jury. *Chicago, M. & St. P. R. Co.* v. *Coogan,* 271 U. S. 472, 478, 70 L. ed. 1041, 1045, 46 Sup. Ct. Rep. 564; *St. Louis-San Francisco R. Co.* v. *Milles,* 271 U. S. 344, 347, 70 L. ed. 979, 983, 46 Sup. Ct. Rep. 520."

As is pointed out in the opinion of the Circuit Court of Appeals, the same rule was laid down by this court in the case of *San Juan Light Co.* v. *Requena,* 224 U. S. 89 at 98-99; 56 L. Ed. 680 at 684; 32 Sup. Ct. 399.

In the case of *Bonner* v. *Texas Co.,* 89 Fed. (2d) 291, the plaintiff was burned by an explosion while he was at work in a room of which he had charge, making fuel mixture of air and natural gas and air and vapor of gasoline. In affirming a judgment for the defendant, the court says at page 294:

> "But Bonner here was in charge of the operation of the room and of the machines with a duty to adjust and supervise them, but with no authority to make alterations or replacements. If it does not appear what caused the explosion, one can only guess whether it was due to something that Bonner did or omitted, or to something not within his duty or control. Nor can it be said on the evidence whether the cause lay in the general condition for which Texaco Can Co. was responsible or in something suddenly done by the Texas Company. When there is no direct evidence, and the proven circumstances are consistent with either of two theories, and there is nothing to show that one rather than

the other is correct, neither is proven. If the plaintiff's right must rest on only one of them, recovery cannot be had. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 339, 53 Sup. Ct. 391, 393, 77 L. ed. 819; *Patton* v. *Texas & P. Ry. Co.*, 179 U. S. 658., 21 Sup. Ct. 275, 45 L. ed. 361. *Res ipsa loquiiur* does not help, for that doctrine applies only when the instrumentalities causing injury are shown to have been wholly in the care of defendant, and not to have been meddled with by the person injured or outsiders." (Citing cases.)

From the foregoing authorities cited and quoted from it appears to be well-settled law that the doctrine of *res ipsa loquitur* cannot be applied where the instrumentality alleged to have caused the injury was not under the management and control of the defendant at the time of the injury. It cannot be invoked where the instrumentality was under the exclusive management and control of the plaintiff as the proof shows it to have been in the case at bar.

Nor do the cases relied upon by the petitioner lay down a different rule. In the case of *Riecke* v. *Anheuser-Busch Brewing Association,* 206 Mo. App. 246, 227 S. W. 631, the instrumentality was in charge of and under the exclusive control of the defendant at the time of the injury. In that case the plaintiff was visiting the defendant's factory. She was watching an employe of the defendant place labels on bottles of Bevo. The employe rolled one of the bottles against another, the bottle exploded causing pieces of glass to fly, one of them striking the plaintiff on the nose. In holding that the doctrine was applicable, the court say at page 250:

"In the present case, the contents of the bottle was manufactured by and placed in the bottle by the defendant, and the bottle was in charge of and under the exclusive control of the defendant until the time of the explosion. And further, the contents

> of the bottle was ordinarily harmless and when properly handled would not explode. The reasons for and the cause of the explosion were peculiarly within the knowledge of the defendant."

It will thus be seen that, although the facts in that case are quite different from those in the case at bar, the controlling factor in applying the doctrine was that the bottle, at the time of the accident, was under the exclusive control of the defendant.

In the case of *Stolle* v. *Anheuser-Busch,* 307 Mo. 520, 271 S. W. 497, also relied upon by the petitioner, the facts are not in any way analogous to those in the case at bar. In that case the plaintiff was injured by the explosion of a sealed bottle of carbonated beverage intended for human consumption. The case went up from a judgment sustaining a demurrer to the plaintiff's complaint. The case differs materially from the case at bar in that after the bottle had burst the explosive force of the contents was spent and the plaintiff was without means of determining the pressure under which the bottle was sealed. Furthermore, the plaintiff alleged, and necessarily offered to prove, that the bottle was properly and carefully handled by all persons into whose hands it came after leaving the possession of the defendant, a feature which does not appear in the petitioner's proof in the case at bar. While the court, in sustaining the plaintiff's complaint indicated that the doctrine of *res ipsa loquitur* might be applied to the facts alleged, it was careful to place its decision upon the broader ground of public policy, as in case of other explosives, saying at page 529:

> "These bottled beverages, containing explosive gases, are put upon the market with the intention that they will be transported throughout the country and sold to consumers for the profit of the manufacturer. Obviously this should be at his risk. Public policy requires that the manufacturer should

> assume the risk and hazards of explosions incident to the reasonable and ordinarily careful transportation and handling of these goods in the usual course of business. The rule of liability announced in *Grand* v. *Bottling Co., supra,* is sane, logical, reasonable and practical and in accord with the rule of decision in this state. It is fair to the manufacturer and will afford the consumer of the beverage and those handling it in the ordinary course of trade reasonable protection, while the contrary rule leaves them practically without redress."

The decision in the *Stolle case,* therefore, does not rest on the application of the doctrine of *res ipsa loquitur,* and even if it does, as was said by the Supreme Court of Missouri in the case of *Tayer* v. *York Ice Machinery Co.,* 342 Mo. 912, quoted from above, after considering the *Stolle case,* at page 923:

> "Fundamental factors differentiate the instant case from cases involving merchandise inflicting injury upon first or prior to being put to its intended use, especially food and drink intended for human consumption, marketed in sealed containers precluding interference and intervention by third parties."

The cases of *Pandjiris* v. *Oliver Cadillac Co.,* 339 Mo. 715; *Bartlett* v. *Pontiac Realty Co.,* 224 Mo. App. 1234; and *Bond* v. *St. L. S. F. Ry. Co.,* 315 Mo. 987, cited by petitioner, deal with the significance to be attached to the presumption raised by the doctrine under the procedural law of Missouri in a case where the proof is such that it can be invoked. They are not in point here, since, as pointed out above, the doctrine is not applicable to petitioner's proof. Furthermore, the rule as laid down in these cases would not control here, even if the doctrine were applicable, for the reason that the trial was had in Illinois and was governed by the procedural law of Illinois where the rule with regard to the significance to

be attached to the presumption, where the doctrine is applicable, is not the same.

4. Furthermore, the doctrine of res ipsa loquitur cannot be invoked by mere proof that an injury was sustained. There must be proof of facts or circumstances which point out the wrongdoer, the tortious character of his act and exclude other probable causes of the injury.

As was said in *Herbst* v. *Levy,* 279 Ill. App. 353 at 362:

> "In well considered cases resting upon the application of this doctrine as tending to establish *prima facie* evidence, and where liability was upheld, it will be found that in every instance there was an essential element present, namely, proof of the existence of the cause or thing which was alleged to have been the negligent act that produced the injury, or proof of such facts from which the existence of such cause or thing constituting the alleged negligent act was the only reasonable inference that could be properly drawn." (Citing cases.)

In the case of *Smith* v. *United States,* 96 F. (2d) 976, the plaintiff sought damages for injuries sustained by the falling of one of the cargo battens from the hold in the defendant's ship; failing to prove negligence he sought to invoke the doctrine of *res ipsa loquitur.* In sustaining a decree dismissing the libel, the court says at page 977:

> "Neither the happening of the event nor any circumstance surrounding the same point to any negligent act or omission which caused the batten to give way and injure appellant. In the absence of such a showing, the application of the doctrine would make appellee an insurer against the accident. *C. F. Burton* v. *Greig,* 5 Cir., 271 F. 271; The Tawmie, 5 Cir. 80 F.(2d) 792. The doctrine is not applicable in any case unless, by a process of probable reasoning the facts and circumstances point out the wrong-

doer, the tortious character of his act, and exclude other probable causes of the injury. The doctrine is not proof and does not supply a want of proof. It is a rule of interpretation by which evidence of facts is made to speak the logical conclusion naturally flowing therefrom." (Citing cases.)

The courts of Missouri are also in accord. In the case of *Gallagher* v. *St. Louis Pub. Serv. Co.*, 332 Mo. 944; 59 S. W. (2d) 619, the plaintiff alighted from defendant's street car and in attempting to pass behind it as the car started to move, stepped upon a wire or rope or something dragging from the rear of the car which caused him to fall. On the trial he produced no proof that the dragging object was some part of the car or its equipment. In holding that the plaintiff could not recover, the court says at page 954:

> "But it was encumbent upon respondent, as plaintiff, in the first instance, to prove a state of facts to which the *res ipsa loquitur* rule applied or which brings that rule into action. (*Nelson* v. *C. Heinz Stove Co.*, 320 Mo. 655, 8 S. W. (2d) 918) and until plaintiff discharges that burden he fails to make a *prima facie* case and no burden of explanation is cast upon defendant. Respondent's case is fatally deficient in that the evidence fails to show either by direct testimony or reasonable and legitimate inference from established facts or circumstances that the dragging object was some part of the car or something pertaining to the car and therefore a state of facts was not made out which invokes the *res ipsa loquitur* rule."

See also *Beebe* v. *St. Louis Transit Co.*, 206 Mo. 419; 103 S. W. 1019; *Klebe* v. *Parker Distilling Co.*, 207 Mo. 480; 105 S. W. 1057; *Removich* v. *Bambrick Bros. Constr. Co.*, 264 Mo. 43; 173 S. W. 686.

The plaintiff's evidence shows that she had used coffee brewers of the same kind and most likely the one in

question five or six times a day for a period of several months and that they had always worked properly. She testified that on the occasion in question she had examined this particular coffee brewer and that it was apparently in good condition. She offered no evidence whatever with regard to what caused the so-called "explosion," if the coffee brewer in question did, in fact, explode. As was said in the case of *Ford Motor Co.* v. *Wolber,* 32 Fed. (2d) 18, where the evidence was in a state very closely analogous to that in the case at bar (p. 21):

> "But when it was considered that this very machine was in regular use for over two years without such occurrence, succeeding one like it in possession of same purchaser for about the same period of time, and similar absence of such manifestation, the reasonable conclusion to be drawn is, not that the occurrence was such that it bespeaks the negligence of the manufacturer in the design or construction of the machine, or in lack of notice of its dangers, but rather that something which was done to the machine after it passed from the manufacturer's custody and control, possibly coupled with circumstances of operation which do not appear in evidence, and which it does not appear the manufacturer could reasonably have anticipated, was responsible for the unfortunate occurrence."

5. The doctrine of res ipsa loquitur is a rule of necessity and cannot be invoked when the necessary evidence is available to the plaintiff.

As has already been pointed out, the petitioner had had the coffee maker in question in her sole possession and control for a period of several months. It was in her sole possession and control at the time of the occurrence. It remained in her sole possession and control from the time of the occurrence to the time of the trial. After the occurrence it was intact except that the

stem of the upper bowl was broken off *below* the rubber gasket by which the two bowls were joined. All of the facts and circumstances concerning the occurrence in question, as well as the coffee maker itself, were available to the petitioner and were not available to the respondent. If there was any defect in the coffee maker, either in its design or construction, or in the material from which it was made, the petitioner, and not the respondent, was in a position to discover it. It was not an unique article. She had others like it and there were many others in common use. She was in a position to examine it and to have it examined and tested by experts for defects, if any there were, as alleged in her complaint. She, and not the respondent, was in a position to discover whether or not the coffee maker in question was defective and, if so, wherein it was defective. Yet she produced no evidence whatsoever in this regard.

The law is well-settled that the doctrine of *res ipsa loquitur* is a rule of necessity and can be invoked only when the necessary evidence is not available to the plaintiff.

In the case of *O'Mara* v. *Pennsylvania R. Co.*, 95 Fed. (2d) 762, the court says at page 763:

> "The doctrine is one of necessity, applicable where the agency or place of the accident is accessible only to the defendant and under his control, * * *"

In the case of *Heffter* v. *Northern States Power Co.*, 173 Minn. 215, 217 N. W. 102, the court, in enumerating the situations where the doctrine cannot be invoked, include at page 219:

> "Nor where the circumstances do not suggest or indicate superior knowledge or opportunity for explanation on the part of the party charged, or if the plaintiff himself has equal or superior means of information."

So, too, is the law of Missouri. *Pronnecke* v. *Westliche Post. Pub. Co.*, 220 Mo. App. 640, 295 S. W. 139 at 141; *Byers* v. *Essex Inv. Co.*, 218 Mo. 375 at 382; 219 S. W. 570 at 571; *Klebe* v. *Parker Distilling Co.*, 207 Mo. 480 at 491; 105 S. W. 1057 at 1060; *Roscoe* v. *Met. Street Ry. Co.*, 202 Mo. 576 at 587; 101 S. W. 32 at 35; *Gibbons* v. *Wells*, 293 S. W. 89 at 92; *Brown* v. *St. Louis Gas Co.*, 113 S. W. (2d) 354 at 359.

In the case of *Klebe* v. *Parker Distilling Co.*, 207 Mo. 480, 105 S. W. 1057, a case where the facts concerning the defendant's negligence, if any, were available to the plaintiff, as in the case at bar, the court says at page 491:

> "Such a state of facts as disclosed by this record never gave rise for the necessity of the application of the rule of *res ipsa loquitur*. Where the reason and the necessity of the application of the rule are lacking it should never be resorted to or applied."

In the case of *Roscoe* v. *Met. Street Ry. Co.*, 202 Mo. 575, 101 S. W. 32, the court says at page 587:

> "The rule of presumptive negligence and the rule allowing the pleading of negligence generally, are rules which grew out of necessity in cases of this character and are exceptions to the general rules of pleading and proof. Where plaintiff, by his admission, admits that there is no necessity, the reason for the rule *ex necessitate* fails, and with it the rule itself."

In the case of *Brown* v. *St. Louis County Gas Co.* (Mo. App. 1939), 131 S. W. (2d) 354, the plaintiff sued the defendant for damage to the water pipes and her house caused by the freezing of the pipes when the hot water system ceased to function during her absence from the house. Failing to prove negligence on the part of the defendant, she sought to invoke the doctrine of *res ipsa loquitur*. Holding that the doctrine was inapplicable to

the facts for the reason that the heating system was under the exclusive management and control of the plaintiff and not of the defendant, the court say at page 354:

> "Here the mechanical devices by which the intake of gas was regulated belonged to the plaintiff herself, was located on her premises, and were at all times subject to her right of exclusive management and control, which right was not affected by the fact that she found it expedient and necessary to authorize one of the defendant's employes to enter upon her premises for the purpose of making the particular adjustment. Conceding the plaintiff did not possess the technical knowledge which would have enabled her to make the adjustment, her ignorance in that regard is nevertheless not to be confused with or mistaken for any lack of right of management and control within the meaning of the doctrine of *res ipsa loquitur*. Certainly she was so situated as to have had full opportunity for acquiring all the information possible regarding the precise cause of her damage, and it does not warrant the application of the doctrine of *res ipsa loquitur* that she may not have had the technical knowledge to avail herself of it.
>
> "Indeed cases do not infrequently arise where the defendant's knowledge of the facts and circumstances attending a particular injury may be far superior to that possessed by the plaintiff, but unless the defendant's superior knowledge is to be attributed to his superior means of information resulting from his exclusive management and control of the agency or instrumentality which through its unusual operation produced the injury, plaintiff will not be permitted to prove his case by the doctrine of *res ipsa loquitur*. On the contrary, he will be held to proof of the specific negligent act which proximately resulted in his injury, and this without regard to any question of how burdensome his lack of personal knowledge of the matter may cause his task to be."

Under the law as laid down by the authorities above cited and quoted from, we respectfully submit that the Circuit Court of Appeals could not have found otherwise than that the doctrine of *res ipsa loquitur* is not applicable to the plaintiff's proof. We have referred largely to cases decided by the Missouri courts for the reason that the petitioner has contended, erroneously however, that the applicability of the doctrine is governed by Missouri law and for the further reason that she asserts, though vaguely and indefinitely, that the rule for its application is different under the law of Missouri than it is elsewhere. This assertion, we submit, finds no support in the decisions of the Missouri courts. Under the law of that state the doctrine is not applicable to the petitioner's proof.

B.

The Circuit Court of Appeals did not weigh the evidence. On the contrary it examined the evidence for the purpose only of determining whether the evidence was sufficient to sustain a verdict for the petitioner. It found as a matter of law that the evidence was insufficient.

The Circuit Court of Appeals did not weigh the evidence as the petitioner has charged. On the contrary it found, as a matter of law, that the petitioner's proof was insufficient to support a verdict in her favor.

By asserting here that "her case was bottomed on the theory of *res ipsa loquitur*" the petitioner admits that her evidence was insufficient to support a verdict in her favor unless, under her proof, she was entitled to the benefit of the presumption raised by the doctrine. There was, therefore, no evidence for the Circuit Court of Appeals to weigh. Whether or not the doctrine was applicable to the plaintiff's proof was a question of law

for the court. It found specifically, as a matter of law, that the doctrine was not applicable. In this it was correct, as we have pointed out above.

Even had the trial court been of a different opinion and entered judgment on the verdict, it would still have been the duty of the Circuit Court of Appeals, on its findings, to reverse the judgment and to direct the trial court to enter judgment for the defendant. *Baltimore & Carolina Lines* v. *Redman,* 295 U. S. 654 at 661; 79 L. Ed. 1636 at 1640; 55 Sup. Ct. 890; *Gulf M. & N. R. Co.* v. *Wells,* 275 U. S. 455 at 459; 72 L. Ed. 370 at 372; 48 Sup. Ct. 15; *Mass. Protective Ass'n* v. *Mouber,* 110 Fed. (2d) 203 at 207; *Lewis-Kures* v. *Edward R. Walsh & Co.,* 102 Fed. (2d) 42 at 45; cert. denied, 308 U. S. 596; 84 L. Ed. 499; 60 Sup. Ct. 132.

The cases cited by the petitioner are not in point. They merely hold that a Circuit Court of Appeals will not substitute its judgment on a question of fact for that of the jury. In each of these cases the court was asked to find the facts differently than did the trial court. In none of these cases was the court called upon to find, as a matter of law, that the evidence was insufficient to support the verdict. In none of them was the applicability of the doctrine of *res ipsa loquitur* involved.

Nor is there any merit to the contentions made on page 20 of the petition. As to the first of these the Circuit Court of Appeals was merely pointing out that an argument made on behalf of the petitioner was not only unsupported by evidence, but was, in fact, negatived by her own testimony. The court did not weigh the evidence to arrive at this conclusion.

Nor did the court weigh the evidence to arrive at the conclusion that the jury should not have been allowed to speculate over whether the relative thickness of the

two tubes was a matter of any significance. The petitioner neither alleged nor offered any proof that the tube in question was not sufficiently strong to function for the purposes intended, or that it was defective, or that it would not withstand heat, or that it was broken before or at the time of or after the accident, or that the breaking of the tube was the cause of the occurrence or had anything whatever to do with it. Nor was there any proof that the broken tube, if in fact it is thinner than the other, was, for that reason, of less strength. It is common knowledge that the strength of glass is not dependent alone on its thickness.

Nor was the court weighing the evidence when it stated that the petitioner was not entitled to the benefit of *res ipsa loquitur* upon "a bald assertion that she followed instructions in every particular, and that the flask was not cracked when she started to use it." The court was pointing out, as a matter of law, that proof of these facts, if they were facts, alone were not sufficient to entitle her to invoke the doctrine. The court was not "brushing aside" this evidence, nor "rejecting this testimony." It was merely pointing out that in the absence of other facts, these facts were insufficient.

In closing this section of her argument, the petitioner states: "In order to evade the application of that rule it was necessary for the court to do one of two things—either to ignore the Missouri rule, or to reject the testimony in support of the presumption." The court did not evade or attempt to evade the application of the rule. It found that the rule was not applicable to the facts. In this we submit it was correct. What the "Missouri rule" is that the court is said to have ignored does not appear from the petition. We submit there is no such rule. Nor did the court reject any of the testimony. It found the testimony insufficient to support the petitioner's contention. In this, also, we submit the court was correct.

C.

The trial court did not weigh the evidence. It found as a matter of law that the evidence was insufficient to support the verdict.

The trial court found, as a matter of law, that the evidence was insufficient to support the verdict. On that ground the trial court set aside the verdict of the jury and entered judgment for the defendant notwithstanding the verdict. The Circuit Court of Appeals has affirmed this judgment.

Contrary to the petitioner's contention, the procedure followed in the trial court was in strict accordance with Rule 50 of the Rules of Civil Procedure, as appears from the petitioner's own statement of the facts. See petition, page 5.

Furthermore, it is well-settled law that it is the duty of the trial court to direct a verdict for the defendant when the evidence is insufficient to support a verdict for the plaintiff. *Chicago M. & St. P. R. Co.* v. *Coogan,* 271 U. S. 472 at 478; 70 L. Ed. 1041 at 1045; 46 Sup. Ct. 464; *Baltimore & Carolina Lines* v. *Redman,* 295 U. S. 654 at 661; 79 L. Ed. 1636 at 1640; 55 Sup. Ct. 890; *Brunet* v. *S. S. Kresge Co.,* 115 Fed. (2d) 713 at 716.

In the case of *Chicago M. & St. P. R. Co.* v. *Coogan,* 271 U. S. 472, this Court say at page 478:

> "It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding." (Citing cases.)

Nor is the petitioner's contention that the action of the trial court was in contravention of the Seventh Amendment to the United States Constitution well

taken. This contention was determined adversely to the petitioner in the *Redman* and *Brunet cases* above referred to.

D.

Negligence is never presumed from the fact of the accident alone.

The contentions made by the petitioner under this section of her brief are untenable. The cases cited lend no support to them. As is pointed out above, and as appears from the petitioner's own statement of the facts, her proof is limited to the fact of the accident alone. As is pointed out above, under the authorities cited and quoted from, the doctrine of *res ipsa loquitur* cannot be invoked "to supply the lack of such proof," as petitioner contends and as she admits was the state of her proof in the case at bar. On the contrary, instead of a "lack of proof" there must be definite proof of sufficient facts to raise the presumption that the proximate cause of the occurrence was the negligence of the defendant and to exclude any other presumption or inference before the doctrine can be invoked. If the facts proved leave the proximate cause of the occurrence in the realm of speculation or guess, the doctrine cannot be applied.

Negligence is never presumed from the fact of the accident alone. *Western & A. R. Co.* v. *Henderson,* 279 U. S. 639 at 642; 73 L. Ed. 884 at 888; *Rotche* v. *Buick Motor Co.,* 358 Ill. 507 at 516; 193 N. E. 529 at 533; *Huff* v. *I. C. R. R. Co.,* 362 Ill. 95 at 101; 199 N. E. 116 at 119.

In the case of *Western & A. R. Co.* v. *Henderson,* 279 U. S. 639, this Court say at page 642:

> "The mere fact of a collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether

> the accident was caused by negligence of the railway company or of the traveler on the highway, or of both, or without fault of anyone. Reasoning does not lead from the occurrence back to its cause."

In the case of *Rotche* v. *Buick Motor Co.*, 358 Ill. 507, a case in which the plaintiff was injured by reason of the alleged defective assemblage of an automobile, the court say at page 516:

> "The mere fact that an accident resulting in an injury to a person or in damage to property has occurred does not authorize a presumption or inference that the defendant was negligent. The burden was on the defendant in error to prove by competent evidence, direct or circumstantial, that the plaintiff in error was guilty of negligence in the manufacture or assemblage of the automobile in question."

Nor is the law of Missouri, which petitioner contends so strenuously should control here, to the contrary. Even had the defendant had superior knowledge of the facts and circumstances surrounding the occurrence, which the evidence shows conclusively it did not have, the doctrine, for that reason, could not be invoked. Under the Missouri rule it is only where the defendant's superior knowledge is due to the fact that at the time of the injury he was in exclusive management and control of the instrumentality that the doctrine can be invoked. As was pointed out in *Brown* v. *St. Louis County Gas Co.* (Mo. App.), 131 S. W. (2d) 354 (1939), at page 359:

> "Indeed cases do not infrequently arise where the defendant's knowledge of the facts and circumstances attending a particular injury may be far superior to that possessed by the plaintiff, but unless the defendant's superior knowledge is to be attributed to his superior means of information resulting from his exclusive management and control

> of the agency or instrumentality which, through its unusual operation, produced the injury, the plaintiff will not be permitted to prove his case by the doctrine of *res ipsa loquitur*. On the contrary, he will be held to proof of the specific negligent act which proximately resulted in his injury, and this without regard to any question of how burdensome his lack of personal knowledge of the matter may cause his task to be."

Nor would a different rule apply if the coffee maker in question had been an inherently or imminently dangerous instrumentality, which it was not. The burden would still be upon the petitioner to prove negligence on the part of the defendant. As was said by the Supreme Court of Missouri in the case of *Tayer* v. *York Ice Machine Co.*, 342 Mo. 912, heretofore referred to and in which the court held the doctrine inapplicable to a similar set of facts, at page 919:

> "The action sounds in tort, is based on negligence, and the legal obligation cast by the cases upon a manufacturer requires the exercise of due care in manufacturing and marketing merchandise imminently, intrinsically, inherently, or essentially dangerous in itself or when applied to its intended use."

The petitioner's proof in the case at bar did not point to any negligence on the part of the respondent.

E.

Whether or not a manufacturer can ever be held liable under the principle of res ipsa loquitur is not an issue in the case.

Petitioner states that if the rule stated by the Circuit Court of Appeals is accepted, it follows "by necessary implication" that no manufacturer can ever be held liable for defective merchandise produced by him. Whether

or not a manufacturer can ever be held liable under the principle of *res ipsa loquitur* is, of course, not an issue in the case at bar. The Circuit Court of Appeals held that under the petitioner's proof in the case at bar the rule was inapplicable. It is significant that the petitioner has not pointed to a single authority where a different rule has been laid down.

Nor do the cases of *McCloskey* v. *Koplar,* 329 Mo. 527, or *Herries* v. *Bond Stores, Inc.,* 231 Mo. App. 1053, support the petitioner's contention. In neither of those cases was the defendant a manufacturer. In each of them the instrumentality causing the injury was under the management and control of the defendant at the time of the injury.

Nor is the case of *Payne* v. *Rome Coca Cola Bottling Co.,* 10 Ga. App. 762, cited by the petitioner, in point nor could it be controlling here. In that case the court was attempting to support its action in applying the doctrine of *res ipsa loquitur* to a case where the injury was sustained as a result of the bursting of a sealed bottle of a carbonated beverage, a fact which as we have pointed out above, differentiates it from the facts in the case at bar. The opinion in that case could hardly be said to have been carefully considered and there is a strong dissenting opinion. The contrariety of opinion of the three judges of that court makes an interesting study when that case is read in connection with the cases of *Floyd* v. *Swift & Co.,* 200 S. E. 531, and *Kuttner* v. *Swanson,* 2 S. E. (2d) 230, which follow it, decided by the same court, the same judges sitting, and illustrate the difficulty a court may get into by attempting to extend the doctrine to cases to which, from the nature of the doctrine itself, it is not applicable.

F.

Although the finding of the Circuit Court of Appeals that the doctrine of res ipsa loquitur is not applicable to the facts presented is sufficient reason for sustaining the judgment, there are additional reasons why the judgment of the trial court should be sustained.

Upon finding from the record before it that the doctrine of *res ipsa loquitur* was not applicable to the facts presented, it became unnecessary for the Circuit Court of Appeals to consider other grounds urged for affirming the judgment of the trial court. Since the petitioner's case was "bottomed on the theory of *res ipsa loquitur*" a finding that this doctrine is not applicable to the facts required an affirmance of the judgment. There are, however, additional reasons shown by the record and urged in the Circuit Court of Appeals why the judgment of the trial court should be sustained. Some of them are as follows:

1. Under the allegations of her complaint, the petitioner was not entitled to invoke the doctrine of res ipsa loquitur.

Not only is the doctrine of *res ipsa loquitur* inapplicable to the facts as found by the Circuit Court of Appeals, but under the charges made in the petitioner's complaint she is not entitled to invoke the doctrine. These charges are set out in the note to the opinion of the Circuit Court of Appeals. It will be noted that the charge "that the defendant carelessly, negligently and improperly made, manufactured and constructed the aforesaid coffee maker * * * whereby said coffee maker was unable to withstand heat when regularly * * * applied * * *" etc., is a charge of specific negligence. Under the law of Illinois, the state where the trial was had, as well as under the law of Missouri, which the petitioner so strenuously contends should control, the doctrine can-

not be invoked when the charge of negligence is specific. Not only do the Supreme Courts of both states so hold, but such has been the construction placed upon the law of both states by the Federal Courts. *Gray* v. *Baltimore & O. R. Co.,* 24 Fed. (2d) 671 at 673; *Federal Electric Co., Inc.* v. *Taylor,* 19 Fed. (2d) 122 at 125; *Bean* v. *Independent Torpedo Co.,* 4 Fed. (2d) 504 at 505; *O'Rourke* v. *Field & Co.,* 307 Ill. 197 at 199-200; 138 N. E. 625 at 626; *Pointer* v. *Mountain Ry. Const. Co.,* 269 Mo. 104 at 114; 189 S. W. 805 at 808.

Without conceding that the law of Missouri could, in the case at bar, control the proof required under the pleadings filed in Illinois, but to point out that the law of Missouri is in accord with that of Illinois, we quote here from the case of *Pointer* v. *Mountain Ry. Const. Co.,* 269 Mo. 104, beginning at page 114:

> "The petition filed by plaintiff excludes the application of the *res ipsa loquitur* doctrine. The plaintiff had pleaded specific negligence, and in such case he cannot rely upon presumptive negligence under the rule *res ipsa loquitur* to make out his case. One who pleads specific acts of negligence must prove such negligence or enough of such acts to justify a recovery, and a failure to do so bars him from a recovery. And this is true although he might have pleaded negligence generally and by an invocation of the doctrine *res ipsa loquitur* had a recovery upon making proper proof. We have gone over this question thoroughly in several recent cases." (Citing cases.)
>
> "Now, in the petition before us in this case the plaintiff avers (1) the faulty and defective construction of the cars used on the 'Racer Dips'; (2) the faulty and defective construction of the tracks of the 'Racer Dips'; and (3) a negligent maintenance and operation of the cars over such tracks.
>
> "This charge of negligence cannot be tortured into a general charge of negligence."

The Circuit Court of Appeals would, therefore, since the petitioner relies on the doctrine of *res ipsa loquitur,* have been justified in affirming the judgment of the trial court on the ground that under the charges laid in petitioner's complaint, she was not entitled to invoke the doctrine.

2. Even though the petitioner had proved sufficient facts to entitle her to invoke the doctrine (which she did not), her own proof, as well as that of the respondent, rebutted any presumption that would have been raised by the doctrine, and under the law of Illinois, the state of the forum, such presumption vanishes entirely.

Even had the plaintiff proved sufficient facts, which she did not, to entitle her to the presumption raised by the doctrine of *res ipsa loquitur,* she testified to facts which rebutted any such presumption. According to her own testimony, she was in the sole and exclusive control of the coffee maker at the time of her injury and had been for quite some time prior thereto. She had used the coffee maker in question successfully at least several times and more likely several hundred times. She had examined it prior to the occurrence in question and found it in good condition. Her own testimony in this regard rebutted any presumption that the coffee maker was defective or that the defendant had been negligent in its manufacture. Furthermore, the defendant produced expert testimony and experimental proof that the coffee maker could not possibly explode if used in the manner and for the purpose intended (Tr. 575 and following). Under the law of Illinois, the state in which the trial was had, which controlled the procedure on the trial, the doctrine of *res ipsa loquitur* yields to any contrary proof. *Bollenbach* v. *Blumenthal,* 341 Ill. 539 at 547; 173 N. W. 670 at 671; *Wilson* v. *East St. Louis & Int. Water Co.,* 295 Ill. App. 603 at 609; 15 N. E. (2d) 599 at 602;

Kerwin v. *Stonington Elevator Co.,* 291 Ill. App. 471 at 475; 10 N. E. (2d) 224 at 226.

In the case of *Bollenbach* v. *Blumenthal,* 341 Ill. 539, the Supreme Court of Illinois say at page 547:

> "The presumption raised by the doctrine of *res ipsa loquitur* does not require 'evidence to the contrary of equal weight' to overthrow it, for * * * such presumption is not of itself evidence, but arises as a rule of evidence and yields to any contrary proof. Presumptions are never indulged in against established facts. They are indulged in only to supply the place of facts, and as soon as any evidence is produced which is contrary to the presumption which arose before the contrary proof was offered, the presumption vanishes entirely."

3. The coffee maker in question was not inherently or imminently dangerous.

The Circuit Court of Appeals might well have taken judicial notice of the fact that the coffee maker in question was neither inherently nor imminently dangerous. It is a simple device for making coffee, found commonly in homes and restaurants, and on display in quantities wherever household utensils are sold. Had the Circuit Court of Appeals examined the record on this question, it would have been required to find as a matter of law that there was no evidence in the record to support the special finding of the jury. The only proof offered by the petitioner was that while making use of it she sustained an injury. Proof that she was injured while making use of it is not proof that it was inherently or imminently dangerous.

As was said in *Miller* v. *Sears-Roebuck & Co.,* 250 Ill. App. 340 at page 344:

> "While at most any innocent article might under some extraordinary circumstances injure a person, yet, this does not render the article itself inherently

and imminently dangerous. Articles like poison, gun powder, a torpedo, a spring gun, a loaded rifle and the like have been held in and of themselves to be dangerous. *Loop* v. *Lynchfield,* 42 N. Y. 351. It was well said in this case that there is scarcely an object in art and nature from which an injury may not occur under some circumstances, but that is not the test as to whether a thing is inherently and imminently dangerous."

4. There being no privity of contract between petitioner and respondent, under the law of Missouri, the state in which the accident occurred, there can be no recovery on the grounds of negligence.

The petitioner did not purchase the coffee maker in question from the respondent. She testified that she secured it from one Sohm, doing business as Century Tea and Coffee Co., at St. Louis. There was, therefore, no privity of contract between her and the respondent. Under the law of Missouri, the state in which the accident occurred, a manufacturer is not liable to a third party with whom he has no privity of contract, on the grounds of mere negligence in the manufacture of his products. *Heizer* v. *Kingsland & Douglas Mfg. Co.,* 110 Mo. 605 at 611; 19 S. W. 830 at 832; *Tipton* v. *Barnard & Leas Mfg. Co.,* 302 Mo. 162; 257 S. W. 791; *Tayer* v. *York Ice Machine Co.,* 342 Mo. 912 at 920-921; 119 S. W. (2d) 240.

In *Heizer* v. *Kingsland & Douglas Mfg. Co.,* 110 Mo. 605, the plaintiff brought an action against the manufacturer of a threshing machine for the death of her husband caused by the bursting of the cylinder in the machine. The manufacturer had sold the machine to one Ellis. The plaintiff's husband was assisting Ellis in the operation of the machine. In reversing a judgment for the plaintiff, the court says at page 611:

"There is no doubt that a cause of action in tort often arises from a breach of a duty created by

> contract, but in such cases there must be some privity of contract between the defendant and the person injured. There being no privity of contract, the suit cannot be maintained." (Citing cases.)

And again at page 618:

> "The plaintiff's case tends to show no more than negligence, and an action based on that ground must be confined to the immediate parties to the contract by which the machine was sold."

Since the coffee maker in question was neither inherently nor imminently dangerous, under the law of Missouri, the state in which the accident occurred, and which law governs the petitioner's substantive rights, the petitioner has no cause of action against the respondent.

CONCLUSION.

In conclusion, it is respectfully submitted that the judgment of the Circuit Court of Appeals is correct and that the petitioner has set up no grounds upon which the writ of certiorari should be granted. Respondent, therefore, prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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